
UTAH LABOR COMMISSION

MICHAEL FRANCIS NIEMI,

Petitioner,

vs.

SOS STAFFING,

Respondent.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 8070502

Michael Francis Niemi asks the Utah Labor Commission to review Administrative Law Judge La Jeunesse's dismissal of his complaint alleging SOS Staffing ("SOS") discriminated against him in violation of the Utah Antidiscrimination Act, Title 34A, Chapter 5, Utah Code Annotated.

The Labor Commission exercises jurisdiction in this matter pursuant to Utah Code Annotated § 63G-4-301 and § 34A-5-107(11).

ISSUE PRESENTED AND PROCEDURAL BACKGROUND

Mr. Niemi filed a complaint with the Utah Antidiscrimination and Labor Division ("UALD") alleging that while working for SOS's client, Convergys, he was subjected to gender discrimination. After an investigation, UALD dismissed Mr. Niemi's complaint. As permitted by the Utah Antidiscrimination Act, Mr. Niemi requested an evidentiary hearing and Judge La Jeunesse was assigned to conduct the hearing.

During the adjudicative proceedings, Mr. Niemi raised a claim of retaliation against SOS, in addition to his complaint of gender discrimination. However, prior to the hearing, SOS moved for dismissal. After reviewing the briefs, Judge La Jeunesse granted the motion and dismissed Mr. Niemi's claim because it failed to state a claim for which relief may be granted. He also declined to amend Mr. Niemi's claim to include retaliation.

Mr. Niemi now requests review of Judge La Jeunesse's decision and that the Commission stay all proceedings until an EEOC investigator from Denver can review the case.

FINDINGS OF FACT

The Commission adopts Judge La Jeunesse's findings of undisputed facts. The following facts are relevant to the motion for review:

Mr. Niemi procured employment through SOS and was assigned a temporary position with Convergys. During his assignment with Convergys, a female employee accused Mr. Niemi of attempting to enter her bathroom stall while at work, which he denied. Convergys notified SOS it

ORDER AFFIRMING ALJ'S DECISION
MICHAEL FRANCIS NIEMI
PAGE 2 OF 4

was terminating its assignment with Mr. Niemi based on the incident. Shortly thereafter, SOS assigned Mr. Niemi to a different account. However, three months later, SOS's client terminated its assignment with Mr. Niemi for different reasons; SOS also terminated Mr. Niemi's employment at that time.

DISCUSSION AND CONCLUSION OF LAW

The Commission has reviewed Mr. Niemi's motion for review, which essentially raises three issues for review: (1) whether his claim should be amended to include retaliation; (2) whether his claim against SOS should be dismissed; and (3) whether the Commission should stay all proceedings pending review from an EEOC investigator.

Amendment of the claim to include retaliation. After Mr. Neimi's claim was assigned to Judge La Jeunesse for adjudication, Mr. Neimi filed a statement asserting that SOS retaliated against him following termination of his assignment with Convergys by withholding employment from him and warning off other employers. Section 34A-5-107 of the Utah Antidiscrimination Act provides that prior to commencement of an evidentiary hearing, a party may reasonably and fairly amend any allegation only with permission of the presiding officer. Judge La Jeunesse declined to amend the charge because Mr. Niemi failed to request or receive permission from the presiding officer to do so. However, Judge La Jeunesse noted that even if the charge had been so amended, it also would have been dismissed because the facts would not have met the prima facie elements for retaliation. The Commission has reviewed the record and concurs with Judge La Jeunesse's decision.

Dismissal of Mr. Niemi's claim against SOS as a matter of law. Next, Mr. Niemi contends the evidence shows SOS discriminated against him when it changed his work assignment based on the unproven complaint of a female employee, and thus his claim against SOS should not be dismissed. Mr. Niemi claims gender discrimination based solely on the fact that the accuser was female and he was male and her word was taken over his. Even assuming that it was SOS who took the adverse action in ending his assignment with Convergys is true, for purposes of the motion, these facts alone, do not support a claim for gender discrimination. In order to establish a prima facie case of discrimination, Mr. Niemi must demonstrate that the adverse action (termination of his assignment with Convergys) was because he is male. Aside from the fact that he is male, no other evidence supports his claim. The Commission finds SOS's acquiescence to its client's request to end Mr. Niemi's assignment with Convergys does not constitute gender discrimination. For the foregoing reasons, the Commission affirms Judge La Jeunesse's dismissal of Mr. Neimi's discrimination claim against SOS.

Request for the Commission to stay its administrative proceedings. Finally, Mr. Niemi requests that the Commission halt—or stay—its proceedings pending a review from an EEOC investigator from Denver.¹ Under the Utah Antidiscrimination Act, the Commission has authority to fully

¹ The Commission notes that the appropriate regional EEOC office with jurisdiction over Mr.

ORDER AFFIRMING ALJ'S DECISION
MICHAEL FRANCIS NIEMI
PAGE 3 OF 4

adjudicate Mr. Niemi's claims. Following the Commission's full adjudication and resolution of Mr. Niemi's claim, the EEOC, which is a federal agency with jurisdiction over discrimination claims arising under Title VII of the Civil Rights Act, will have the opportunity to review the agency's decision and make its own independent decision as to Mr. Niemi's federal claim of discrimination. Thus, the Commission denies Mr. Niemi's request to halt these proceedings.

ORDER

The Commission affirms Judge La Jeunesse's dismissal of Mr. Niemi's claim of discrimination against SOS. It is so ordered.

Dated this 24th day of December, 2008.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

Niemi's claim is the Phoenix, Arizona office.